Supreme Court, U.S.
FILED

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NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

JANICE BATES HOLMES

Petitioner,

versus

WAYNE SCOTT

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seating of one juror who has been told by the victim of the crime what happened violates due process of law and the right to a fair and impartial trial. Amends. V, VI, and XIV.

2. Whether the failure of trial counsel to challenge a juror who has been told by the victim of the crime what happened raises a presumption of prejudice requiring no inquiry as to actual performance. Amends. VI & XIV.

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The opinion of the United States Court of Appeals for the Fifth Circuit, affirming denial of the writ was not published. A copy of the unpublished opinion of December 4, 1995, is attached as Appendix.

STATEMENT OF JURISDICTION

Because Petitioner did not file a motion for rehearing in the Fifth Circuit, this petition is due on or before March 4, 1996. This Court has jurisdiction of the petition under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The controversy here involves the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant Janice Holmes was convicted of aggravated robbery on August 15, 1980, in the 287th District Court, Muleshoe, Bailey County, Texas, and sentenced to 60 years confinement by the jury. (R.I. 14, 15). After direct appeal and, then, state habeas action, she sought relief by way of §2254. On April 12, 1995, after evidentiary hearing, the Magistrate recommended that the writ be dismissed with prejudice. (R.I. 73). Appellant filed written objections to the recommendation. (R.I. 99). On May 30, 1995, the United States

District Court concurred with the Magistrate and dismissed the petition. (R.I. 107). A timely notice of appeal to the Fifth Circuit was filed. (R.I. 108). On June 16, 1995, a certificate of probable cause was issued. (R.I. 109).

The Fifth Circuit disposed of the appeal by summary calendar on December 4, 1995. See Appendix.

REASONS FOR GRANTING THE WRIT

A. Standard of review on ineffective assistance.

A claim that counsel's performance fell below the threshold for effective assistance is analyzed under the framework that this Court established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To carry his burden, Petitioner must show that (1) his attorney's performance was deficient and (2) this inadequate exhibition prejudiced his defense.

To satisfy the first prong, Petitioner must show that the alleged errors of his counsel were so serious as to render the assistance received below the constitutional minimum guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 686. That constitutional minimum is measured against an objective standard of reasonableness. Id. at 688.

As to the second prong, the Petitioner must demonstrate that his counsel's inferior performance so prejudiced his defense that the proceeding was

fundamentally unfair. Id. This test is the linchpin and requires a showing that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Under *United States v. Cronic*, 466 U.S. 648 (1984), prejudice is presumed without inquiry when the circumstances are sufficient to raise a presumption of ineffectiveness as opposed to a court "looking at actual performance."

A shorthand summary of the voir dire by the prosecution and defense is necessary to put Appellant's claim into proper perspective.

a. The prosecutor's voir dire.

The prosecutor determined by a show of hands that "practically everyone of you" (jury panel) has heard something about the case. (R. II. 15).

1. NORMAN BAYS, a first row prospective juror, had represented the co-defendant, Jimmy Jordan, a fact with which trial counsel was unaware. (R. II. 15). Mr. Bays believed his knowledge of the facts would preclude him from being a fair and impartial juror. He was excused. (R. II. 16).

2. BETTY JO DAVIS, a first row prospective juror, had visited with someone who was a witness in the case. Whatever

Ms. Davis talked with the "someone" about would likely influence her verdict. She was excused. (R. II. 17).

3. BETTY LONG HOPPER, a first row prospective juror, had a conversation with "someone" about the case which would definitely influence her verdict. She was excused. (R. II. 17, 18).

4. JAMA BROWN, a first row prospective juror, had spoken with "someone" she knew to be a witness, but it would not necessarily influence her verdict. Trial counsel for Appellant asked her no questions. (R. II. 18).

5. ANITA S. ALLGOOD, a first row prospective juror, spoke with "the lady that was injured in the robbery. She just told me what happened." Her husband was under subpoena to testify for the State. None of this would influence her verdict. (R. II. 18, 19). No questions were asked by trial counsel for Appellant.

6. HARRY WADDLE, a second row prospective juror, had talked to a unknown State's witness. He believed it would influence his verdict. (R. II. 20).

7. JESSIE GRAY, a second row prospective juror, vacillating on the simple question of whether he had spoken to someone who purportedly knew the facts of the case, grudgingly acknowledged that he had. Gray said he could be fair and not influenced by what he had heard. (R. II. 21). No questions were asked by Appellant's trial counsel.

8. LOYD ROGER ALBERTSON, a next row prospective juror, had spoken to a witness about the facts of the case. Albertson believed he could lay aside what he had heard and enter the proceedings with an open mind. No questions were asked by Appellant's trial counsel. (R. II. 22, 23).

9. HAL ANDERSON, a prospective juror, indicated he had spoken with a witness in the case and it would influence his decision making. Mike Charlton, Appellant's co-counsel at trial, challenged Anderson for cause. He was excused. (R. II. 23, 24).

Mr. Young, the prosecutor, reckoned that "the rest of you" are telling us that, although you may have heard something about the case, it was coffee shop, radio or newspaper talk. Apparently all of the remaining veniremembers believed they could resolve the case from the facts presented by witnesses under oath in the courtroom as opposed to extrinsic testimony. (R. II. 24).

Mr. Young then explained his burden of proof (R. II. 27), that jurors should not place an impossible burden on him, viz, proof beyond all possible doubt, and *honed* the distinction between proof beyond a reasonable doubt and beyond all possible doubt (R. II. 28, 29), covered the presumption of innocence (R. II. 30), touched on the defendant's constitutional right to remain silent (R. II. 30, 31), and made plain the punishment range in the case. (R. II. 31-34).

10. MARTHA BUSH, a prospective juror, was not convinced she could participate in punishing or sentencing anybody for a crime, especially to a term not to exceed 99 years or life and not less than 5 years. (R. II. 34, 35). No one challenged her for cause.

Mr. Young concluded his voir dire. (R. II. 37).

b. Appellant's voir dire.

Michael Charlton, Appellant's co-counsel at trial, began his voir dire by attempting to determine how many veniremembers knew Mr. Young, the prosecutor in the case. (R. II. 38, 39).

11. LOU ANN BLACK, a prospective juror, upon questioning from Mr. Charlton, insisted she would be able to set aside her feelings about Mr. Young, look at the evidence fairly and listen to the defense counsel with equal attention. (R. II. 39, 40).

12. DOUGLAS BALES, a prospective juror, indicated that he would be able to abolish his long standing but non-professional relationship with Mr. Young, take seriously what defense counsel might suggest and render a fair decision. (R. II. 40, 41).

13. JOHN C. RANGE, a prospective juror, did not know Mr. Young. (R. II. 42).

14. MARVIN GEORGE DAVENPORT, a prospective juror, knew Mr. Young; however, he would be able to evaluate the evidence fairly. (R. II. 42).

15. CLIFFORD BUCKNER, a prospective juror, who worked at the Goodyear Tire

Company, knew Mr. Young, but that fact was of little consequence when fairly gauging the evidence. (R. II. 42, 43).

When asked by Mr. Charlton if any veniremember would attach more significance, weight or credibility to witnesses offered by Mr. Young than those proffered by the Defense, he was met with silence, presumably indicating a collective "no." (R. II. 43, 44).

Mr. Charlton then dealt with the panel as a whole regarding the law equally applying to all citizens and objections by the lawyers. (R. II. 44, 45).

16. LOYD ROGER ALBERTSON, a prospective juror (see #8, ante), was questioned by Mr. Charlton; but no questions were asked regarding his admission of speaking to a witness about the facts of the case. (R. II. 45).

17. CARL POLLARD, a prospective juror, was questioned superficially reference considering evidence excluded by the trial judge. Pollard exclaimed he would only consider evidence admitted. (R. II. 46).

18. CHESTER EMBRY, a prospective juror, would not hold objections against any

party. (R. II. 46, 47).

19. DALE MIDDLEBROOKS and DARREL EMBRY, #18's nephew, prospective jurors, indicated that objections did not bother them. (R. II. 48).

20. ROY DAVIS, expressed that he would not be bothered by objections. (R. II. 49).

21. BETTY EUBANKS, who never had any dealings with Blacks, but thought of them like other people, and Roy Lee Farley, who disclosed that "their color don't bother me," would have no difficulty in being fair to a Black. Farley could be fair on the issue of punishment. (R. II. 49-53).

22. GLENN RAY CARTER, a farmer and veniremember, who had "just never been around them (Blacks) very much," said he "would look at the situation like it is." (R. II. 53).

23. W.T. WATSON, a farmer, and Claude H. Wileman, a retired propane company truck driver, expressed no reservations about fairly treating a Black defendant. Wileman knew some black people and, in response to a question regarding always being able to be neutral in his dealings with Blacks, exclaimed, "Oh

yeah." (R. II. 53-55).

24. J.E. MEEKS, a pastor at the First Baptist Church, a prospective juror, had some dealings with Blacks which had been good. In essence, he believed that he could be fair at guilt and in assessing the penalty. (R. II. 56-58).

Mr. Charlton then attempted to determine how many veniremembers had heard nothing about the case. (R. II. 58). It appears that only four (4) members of the 64 member panel had heard nothing about the case. (R. II. 59, 60).

Russell C. Busby, lead counsel for the defense, then began his voir dire examination of the panel. (R. II. 61). He explained the burden of proof as to each element of the offense and then *heaved at gnats and swallowed camels*, viz, if the jury believed a crime occurred but not in Bailey County, the jury would be duty bound to acquit. (R. II. 62-64).

25. ANITA S. ALLGOOD, a prospective juror, see #5, ante, indicated that, although her husband had been subpoenaed as a witness, they had not talked about the case. Mr. Busby did not know that her husband was a doctor as opposed to a police officer. (R. II. 66).

Mr. Busby, apparently speaking to Mrs.

Allgood and the rest of the panel discussed the fact that police officers should not be spontaneously clothed with more credibility or believability than an ordinary citizen because of their professional station. (R. II. 67).

Mr. busby acknowledged that the case would involve testimony from State's witnesses who were friends of the panel members. Mr. Carter responded to the following question, "Is anybody going to give her (referring to Viva Lindsey, the jewelry store owner and complainant in the indictment) testimony more credence because of your friendship with her or because of your knowledge of her?" (R. II. 68).

> 26. GLENN CARTER, a prospective juror, who failed to respond earlier to similar questions, was emphatic. He and Viva Lindsey had grown up together; "Her husband, his daddy and my daddy were friends." (R. II. 69). Mr. Busby finally challenged him for cause and the court agreed. (R. II. 70).

Mr. Busby thereupon attempted to determine how many panel members were aware of the disposition of the co-defendants' cases. (R. II. 71). The following proceeding occurred at the bench in the presence, but presumably out of the hearing of the panel, viz,

27. MARTHA ROBINSON BUSH, a prospective juror, only knew that the verdicts against Jordan and Willard had been guilty, but, after another question, agreed that she knew the penalty had been 99 years for each. (R. II. 73). [Jordan was sentenced to 90 years and Willard to 50 years, (R. I. 9)] Those facts did not influence her in this case and, as a consequence, she would be able to assess as little as 5 years confinement here. (R. II. 73).

28. JACK BATES, a prospective juror, heard at the coffee shop that Jordan and Willard each received 99 year sentences. (R. II. 74). Mr. Bates "thought" he would be able to put out of his mind that Jordan and Willard were guilty and got 99 years and be fair and impartial to Appellant. (R. II. 74, 75). Busby then asked him "how he would put that out of his mind?" The State objected and the court sustained, reasoning that to permit an explanation would penetrate the mental processes of the panel member. (R. II. 75, 76). Busby objected on the theory that the question unanswered prevented him from intelligently using his peremptory challenges. (R. II. 76). He asked no further questions.

29. LOYD ROGER ALBERTSON, a prospective juror, see #8, ante, knew from the newspaper that Jordan and Willard had each received 99 years for their role in this robbery. (R. II. 76). Albertson didn't know why this would have any bearing on him fairly deciding this case. He also could assess a 5 year sentence herein if he thought Appellant was deserving. (R. II. 77). Mr. Charlton then asked Albertson, "Can you set aside your prior knowledge of the facts in the case." The State objected and the court sustained, again reasoning that the question was intended to slice though the mental processes of the panel member. (R. II. 77, 78). Mr. Charlton objected on the theory explained in #28, above. The court then openly chastised Messrs. Busby and Charlton for double-teaming Albertson. The court believed, correctly, that one lawyer should examine panel members. (R. II. 78).

30. W.T. WATSON, a prospective juror, heard "the other two guys had been tried and sentenced." He did not know the number of years. (R. II. 78, 79). He didn't think that would impact his ability to serve on this jury and assess a punishment of 5 years, if necessary

and appropriate. (R. II. 79). Mr. Busby then wanted to know how Mr. Watson "could put aside the knowledge that [he] had of the convictions in this case?" (R. II. 79). The court would not allow the question, but gave Appellant a running objection on it. (R. II. 80).

31. CHESTER EMBRY, a prospective juror, see #18, ante, was on the panel in Jordan's and Willard's case; however, he was not selected on the petit jury, but his sister was. She told him what punishments were dealt out. (R. II. 80, 81). Mr. Busby called for a peremptory challenge for cause because Embry had sat though the voir dire on the Jordan/Willard case(?) which was denied. He then challenged because his sister was on the jury and discussed the case with him; that was denied. (R. II. 81). Mr. Embry, although he knew the punishment assessed against Jordan and Willard, the facts allegedly presented against them in the voir dire (?), would not be prejudiced or biased in this case. (R. II. 82). The verdicts in the other case would not serve as any guideline in this case. (R. II. 83).

32. DARREL RAY EMBRY, a prospective juror, see #19, *supra*, only knew that the other two guys were sentenced. He either read that or heard it at the coffee shop. This wouldn't impact his decision making process at guilt or in assessing the punishment. He would go by the evidence in this case. (R. II. 84, 85).

Mr. Busby then challenged Mrs. Bush, Chester and Darrel Embry, Roger Albertson and W.T. Watson for cause in the presence and, presumably, hearing of the remainder of the panel because of their purported knowledge of the results of the Jordan/Willard trial. (R. II. 87). The trial court, mystified, wondered if he had been asleep during the proceeding since he thought all those challenged claimed they could lay aside whatever information possessed. (R. II. 87). The trial court overruled the challenges. (R. II. 88).

Mr. Busby covered the presumption of innocence. (R. II. 88). He then asked most, if not all, members of the panel some of the most harmless, unobjectionable and superficial questions in the history of lawyerdom. (R. II. 90-114).

A thorough and skillfully conducted *voir dire* should be adequate to identify juror bias, even in a community saturated with publicity adverse to a defendant. As the District of Columbia Court of Appeals noted, "voir dire has long been recognized

as an effective method of rooting out such bias, especially when conducted in a careful and thoroughgoing manner." *In re Application of National Broadcasting Co.*, 653 F.2d 609, 617 (D.C.Cir.1981). For this reason the courts of appeals have repeatedly expressed "confidence in the effectiveness of a skillful, deliberate, searching and thorough voir dire to counteract the threat of pretrial publicity." *United States v. Duncan,* 598 F.2d 839, 865-66 (4CA 1979), *cert. denied,* 444 U.S. 871 (1979); *Calley v. Callaway*, 519 F.2d 184, 209 n. 45 (5CA 1975); *United States v. Capo,* 595 F.2d 1086, 1091-92 (5CA 1979); *Yount v. Patton,* 710 F.2d 956, 979 (3CA 1983); *Nelson v. State,* 832 S.W.2d 762 (Tex.App. [1st] 1992).

As *Irvin v. Dowd,* 366 U.S. 717 (1961), makes plain, a juror's subjective affirmation of impartiality is not dispositive of the question of his bias. It has always been clear that "merely going through the form of obtaining jurors' assurances of impartiality is insufficient." See *Patton v. Yount,* 467 U.S. 1025 (1984); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364, 372 (2CA 1963), cert. denied, 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143 (1963). Instead, the trial court must determine independently and objectively whether the jurors' assurances are credible. *United States v. Gerald,* 624 F.2d 1291, 1296-97 (5CA 1980).

Although 60 out of 64 panel members knew or heard about the case from talking to a witness,

gossip, radio or television, or the newspaper (R. II. 15, 58-60) , Busby did not ask any panel member what he or she heard and from whom. For example, he could have asked each panel member

1. When did you hear about the facts;

2. Where were you when you heard about the facts;

3. Did a witness tell you about the facts;

4. Did a non-witness tell you about the facts;

5. What did the witness or non-witness tell you about the facts;

6. What is that witness or non-witness' name;

7. How well do you know that person;

8. Did you believe what that person told you;

9. How many times did you talk to that person or persons about the facts;

10. Did any of the witnesses include Viva Lindsey or employees of her jewelry store.

After establishing what information the record already exhibited, viz, that practically

everyone in this small community knew about the case or facts or both, follow-up questions reference the credibility and good-faith of the witness and reliance thereon by the veniremember should have been asked. And, did the panel member have any reason to believe that the witness had fabricated the whole of it. If not, the veniremember would necessarily possess an objective and fixed opinion about Appellant's guilt, notwithstanding subjective assurances to the contrary. *Irvin v. Dowd, supra*, 366 U.S. at 724.

Anita S. Allgood, who sat on the petit jury, was told what happened by the lady who was injured in the robbery. (She was referring to Jo Ann Sikes, an employee of Lindsey's Jewelry Store. (R.II. 18, 19; III. 24, 61)). Mrs. Allgood's physician-husband was subpoenaed by the State; however, none of this would influence her verdict. (R. II. 18-19). Busby asked her no questions regarding what "the lady" told her; instead, he asked her whether she thought police officers inherently possessed more credibility than ordinary witnesses. (R. II. 67).

Appellant supposes had a member of a jury panel spoken to a friend who was an alibi witness for the accused, another confrere, that prospective juror would be subject to a challenge for cause from the prosecution.

Although 60 of the 64 veniremembers had heard about the case from one source or another, no one bothered to determine the "bare facts" of what each panel member had heard and from whom and whether it was believed and, if not, why. Busby failed miserably, but so did the trial judge who took at face value the subjective assurances of panel members that each could be fair and impartial notwithstanding the information possessed. *Irvin v. Dowd, supra*, 366 U.S. at 724. This is a classic example of "merely going through the blind protocol of obtaining jurors' assurances of impartiality" without having a clue of the nature of guilty facts each possessed, a form that has been rejected since, at least, 1807. *United States v. Burr*, 1 Burr's 416 (CC Va 1807).

Appellant realizes that presumption of prejudice cases usually deal with extrinsic constraints beyond counsel's control. *United States v. Geders*, 425 U.S. 80 (1976) (blanket order during overnight recess which forbade discussion between counsel and client). Few cases are decided on the basis of an error or errors by counsel that are so serious a prejudice assessment is suspended; however, see *United States v. Javor*, 724 F.2d 831 (9CA 1984) (when criminal defense lawyer sleeps through substantial portion of trial, such conduct is inherently prejudicial and no separate showing of harm or unfairness is necessary).

The real issue here is whether allowing the impaneling of a juror who was told what happened by one of the victims is "structural error", which requires no inquiry regarding harm, or "trial error", which requires an assessment of prejudice or harm. *Arizona v. Fulminate*, 499 U.S. 279 (1991).

Chapman v. California, 386 U.S. 18 (1967), delineated three constitutional errors that could not be categorized as harmless, viz, using a coerced confession against a defendant, overruled in *Arizona v. Fulminate*, supra, depriving a defendant of counsel, and trying a defendant before a biased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927). Later, in *United States v. Cronic*, supra, the Court held that, in some instances, counsel's conduct can be the functional equivalent of being deprived of counsel.

It is naive to believe that "she just told me what happened" means something other than "she told me what happened"; consequently, unless Mrs. Allgood had an undisclosed reason to disbelieve Ms. Sikes about the "facts" of what happened, she had a fixed opinion about the guilt of Appellant, notwithstanding vague assurances to the contrary. *Irvin v. Dowd*, 366 U.S. at 724.

In *Nelson v. State*, supra, the Court could not accurately evaluate the prejudicial effect from the impaneling of three questionable jurors; however, it did decide that Nelson was not provided a fair and impartial jury to decide his guilt and penalty, which

undermined confidence in the outcome. That Court concluded that one biased juror on the jury renders it partial, citing *Shaver v. State*, 280 S.W.2d 740 (Tex.Cr.App. 1955), and Art. V, §13, Texas Constitution.

As *Irvin v. Dowd*, supra, points out, the existence of a preconceived notion as to the guilt or innocence of an accused, without more, is insufficient to rebut the presumption of a prospective juror's impartiality. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. Id. at 723.

Here, there is no mere notion respecting guilt. A petit juror, Mrs. Allgood, was told by the victim of the crime what happened. (R.II. 18, 19). The trial judge in this case did not examine Mrs. Allgood to determine whether she believed what Ms. Sikes told her about "what happened." A quick reading of the testimony of Ms. Sikes, the prosecution's first witness, might arguably reveal what she told Mrs. Allgood before the trial. (R.III. 5-41). Additionally, Ms. Sikes was "the lady who was injured." (R.III. 24).

If Mrs. Allgood had been on the panel in *Irvin*, she would have been challengeable for cause since she had a *conversation with a witness of the transaction*, or read reports of their testimony, or heard them testify. Id. at 725.

Because the trial lawyer failed to challenge Mrs. Allgood for cause, Appellant was denied her fundamental right of an impartial jury composed of people who were unprejudiced, disinterested and equitable.

CONCLUSION

For the foregoing reasons, it is requested that the Court grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

(Opinion Filed December 4, 1995)

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10546
Summary Calendar

JANICE BATES HOLMES
Petitioner/Appellant

vs

WAYNE SCOTT, DIRECTOR,
TEXAS DEPT. OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent/Appellee.

Appeal from the United States District Court for
the Northern District of Texas
USDC No. 5:94-CV-147-C

Before WIENER, PARKER & DENNIS, Circuit Judges.

PER CURIAM:[1]

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1 Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled

Janice Bates Holmes appeals the district court's denial of her petition for habeas corpus. Holmes argues that her trial counsel was ineffective for failing to conduct a voir dire sufficient to uncover juror bias. She also argues that her appellate counsel was ineffective for failing to raise the issue on direct appeal.

We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm for the reasons given by magistrate judge and adopted by the district court.

AFFIRM.

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principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.